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ABSTRACT

This paper, addressed to public school employers, discusses lessons to be learned from the Wisconsin Legislature's passage of a 1978 law known as mediation-arbitration, which allows employers and unions to agree to an alternative voluntary impasse procedure to the one set forth in the statutes. First, the paper discusses the history of the agency shop (fair share agreements), and binding arbitration. Next, it discusses the mediation-arbitration law, which, it says, has worked to the detriment of public employers. The paper says that of the decisions handed down in Wisconsin, the unions have won the majority of cases involving fair share. To avoid this, employers must create and maintain an effective lobbying organization at the legislative level. They also should see the advantage of allowing municipal employees in small school districts the right to strike rather than forcing compulsory arbitration on them. Finally, employers should evaluate the concept of legalizing compulsory union dues and then subjecting them to binding arbitration. (Author/LD)

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MEDIATION-ARBITRATION

The Wisconsin Experience

Stevens L. Riley

Wisconsin, birthplace of the Progressive Party, founded early in this century by "Fighting Bob" LaFollette, has long been in the vanguard where protective labor legislation is concerned. It was the first to enact a comprehensive worker's compensation law and after that, continued to lead the states in the enactment of further protective social legislation.

Shortly after the enactment by Congress of the National Labor Relations Act in the mid-1930's, the Wisconsin legislature passed the Wisconsin Employment Peace Act, which created the Wisconsin Employment Relations Commission--a counterpart of the NLRB. This state agency has operated since its inception (in a highly professional manner I might add) as a state counterpart of the NLRB. In addition, the WERC has also performed locally the function of the Federal Mediation and Concilation Service, providing mediators and arbitrators for Wisconsin's employers and unions. I have practiced rather extensively before this Commission, in all aspects of its

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operations, over a period of the last twenty years; and it is my opinion that it has consistently performed in a highly unbiased and very professional manner. I'm taking the time to discuss this because, without the WERC, Wisconsin would not have achieved the enviable record it has over the years in the enactment and administration of progressive labor legislation. Without the existence of this agency and the leadership provided by its members, which earned and retained the respect of both management and labor, the present situation in Wisconsin would probably not exist, and even if a comparable situation does not exist in your own state, there are valuable lessons to be learned from the Wisconsin experience.

Prior to the 1960's, there was no legal authority in Wisconsin for the existence of public employee unions and, of course, there was no obligation on the part of any municipal employer to recognize or bargain with them. As in other states, at one stage of development or other, pressure gradually developed for the enactment of legislation recognizing certain rights for public employees, including school

teachers. The first legislation in Wisconsin to concern itself with the subject was enacted in the early 1960's, and has since become known as the Municipal Employment Relations Act.

The initial statute did not require employers to bargain with municipal unions, but merely granted to such employees the right of self-organization, the right to affiliate with labor organizations of their own choice and the right to be represented by them in conferences and negotiations with municipal employers. This early legislation also made it a prohibited practice for a municipal employer to interfere with a municipal employee in the exercise of his rights, to encourage or discourage membership in a labor organization, or to prohibit an authorized representative of an employee organization from appearing before any governmental unit or body. The law also allowed the municipal employer to enact reasonable rules necessary to maintain continuity or public service and to adopt a negotiated agreement on the subject. This law is roughly tantamount to the "meet and confer" laws, which were later enacted in other states, and which as I understand it, are presently the law in many jurisdictions.

This original statutory enactment also provided that, in certain circumstances, strictly advisory "fact finding" procedures could be initiated in cases where:

1. An employer or union failed to refuse to meet and negotiate with good faith at reasonable times and a bona fide effort to arrive at a settlement; or

2. After a reasonable period of negotiations, where the parties were deadlocked.

The law made no reference to a duty to bargain and did not make a refusal to bargain a prohibited practice. As a result, there was a continuing controversy over the obligation of a municipal employer to bargain in the traditional sense and finally the Wisconsin Supreme Court concluded that this language did not impose such a duty upon a municipal employer.

Following this ruling, and in keeping with the increasing political awareness of government employees everywhere, the public employees' lobbyists convinced the legislature that it would be a good idea to specifically impose on municipal employers the duty to bargain collectively with their employees. In 1970, this was accomplished.

At the same time, another interesting development took place. As a result of several bitter controversies between the City of Milwaukee and its Police Department, a special provision was added to the amendments providing for binding arbitration of labor disputes between Milwaukee and its Police Department. This was to be a forerunner of later legislation which provided for binding arbitration for law enforcement and fire protection agencies throughout the state, and it eventually culminated in the current Wisconsin law which provided the mechanism for binding mediation-arbitration of labor disputes in all areas of municipal employment.

However, going back to 1970, only the obligation to bargain was imposed on municipal employers, and except for the case of the Police Department in the City of Milwaukee, there was no obligation to submit the terms of any collective bargaining agreement to binding arbitration.

This situation continued for some time, during which there were the usual number of public employee strikes--mostly involving teachers--which attained a great deal of publicity and (quite frankly, in my opinion) were given a great deal more importance than they were actually worth. However, that

sort of thing is news, and it will always get a big play.

About the same time the Wisconsin legislature imposed on its municipalities the duty to bargain, it also recognized--again as a result of extremely effective lobbying by public employee unions--the Union Security Agreement. In effect, what the legislature did was recognize, and legalize what, in many states in the private sector, is known as an "agency shop." It allowed municipal employers to impose as a condition of continued employment the requirement that each and every one of the employees in a bargaining unit must contribute to the bargaining agent -- the union -- their share of the cost of negotiating and administering the agreement -- a sum which usually equates with union dues. Unfortunately, at least from the employer's point of view, the drafters of this legislation were unduly influenced by basic union philosophy and referred to this type of requirement as a "fair share agreement." I prefer to refer to such payments as "compulsory union dues," which I submit is a more accurate categorization of the payments involved. However, for the balance of this presentation I will use the sugar-coated language imposed on us by the legislature.

In my opinion, it was the legalization of the "fair share" agreement that led directly to the great pressure that developed in Wisconsin for binding arbitration of municipal labor disputes. The "fair share" clause was, understandably, particularly unpopular with municipal employers, and in a great many bargaining situations it tended to be the last issue settled. However, strikes remained illegal and -- notwithstanding isolated examples to the contrary-- there still existed a general inability of public employees to successfully pull off an illegal strike. Therefore, the unions found it increasingly difficult to make "fair share" alone a strike issue. The unions were relatively unsuccessful in their attempts to obtain compulsory financing of their operations via the regular bargaining process.

Three things sent the unions back to the legislature:

1. The occurrence of several highly publicized (but quite overrated) public employee strikes;

2. The fact that public employee unions were gaining increasing political clout; and

3. The fact that the unions were finding it difficult to obtain compulsory contributions to their operations at the bargaining table.

Their original proposal to the legislature was that they be given the right to strike and -- as I will discuss in more detail later -- it might have been better had the legislature done so than for it to have enacted the compulsory arbitration law. However, hindsight is always 20-20.

In 1977, the Wisconsin legislature passed a new law -- to be effective January 1, 1978, providing for a "Voluntary Impasse Resolution Procedure" known as mediation-arbitration. I will refer to it hereafter as "med-arb."

The law first provides that any employer and union can, if they wish, agree to an alternative voluntary impasse resolution procedure to the one set forth in the statutes, but to my knowledge, and although I believe it might be propitious in many circumstances for a municipal employer to propose an alternative procedure, no one has done so.

In any event, the med-arb process works like this:

When a dispute hasn't been settled after a reasonable period of negotiation (which may include mediation by the WERC) and the parties are deadlocked, either party, or the parties jointly, may petition the WERC to initiate med-arb.

On receiving such a petition, the WERC makes an investigation (and a formal hearing can be held in connection with this investigation if the WERC wishes) to determine whether or not med-arb should be commenced---in other words, whether or not the parties are truly at impasse. This investigation is conducted by a member of the WERC staff, who meets with the parties and actually functions in the initial stages of the investigation as a mediator.

When the investigator is convinced that an impasse is present, he calls for and receives from each party its final offer, in writing, on all issues in dispute.

(As an aside, it should be pointed out that these final offers may include only mandatory subjects of bargaining; if one party believes the other is insisting on a permissive or non-mandatory subject of bargaining, it may appeal directly to the WERC for a ruling on that question.)

At any rate, final offers are submitted to the investigator, and at the same time, the parties also execute and submit to the investigator a stipulation, in writing, concerning all the matters on which they have agreed prior to that point. At this point, the investigator delivers each party's

final offer to the other, and, thereafter, neither party can amend its offer without the consent of the other. (Actually, the administrative rules adopted by the WERC to flesh out the statute allow certain opportunities for further amendment, but time limitations preclude their discussion.)

Following completion of the investigation and the exchange of final offers, the parties are provided with a list of five mediator-arbitrators and, by alternately striking, arrive at the one to be appointed.

The mediator-arbitrator establishes dates and places for the mediation-arbitration sessions, subject to the right of at least five citizens of the jurisdiction served by the municipal employer, if a petition therefor is filed within ten days of the date on which the mediator-arbitrator is appointed, to require a public hearing in the jurisdiction for the purpose of providing an opportunity to both parties to explain or present supporting arguments for their positions and to members of the public to offer their comments and suggestions. In most cases, no petition for public hearing is filed.

The mediator-arbitrator is first required to attempt to mediate the dispute. If mediation fails, he is required to hold a hearing, whereat the parties present evidence in support of their final positions. Following this, briefs are normally filed and thereafter a decision is rendered.

It is extremely important to note that under Wisconsin Law, arbitration is "all or nothing." The mediator-arbitrator must accept one party's offer in its entirety. He cannot split them down the middle or compromise them in any manner. This, I believe, has been to the detriment of public employers. Unions simply do not have as much to lose in these situations as employers do.

The mediator-arbitrator is required by the law to consider these seven factors in deciding between the final offers presented to him:

1. The lawful authority of municipal employer.

2. The stipulations of the parties.

3. The interest and welfare of the public and the financial ability of the unit of government to meet the cost of any proposed settlement.

4. Comparable wages, hours, and conditions of employment of <u>other</u> municipal employees performing

similar services and other employees generally in public employment in the same community and in comparable communities, and comparable wages, hours, etc. in private employment in the same community and in comparable communities.

5. The average consumer prices for the goods and services, commonly known as the cost of living.

6. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays, and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

8. Such other factors not confined to the foregoing which are normally and traditionally taken into consideration in the determination of wages, hours, and conditions of employment through voluntary collective bargaining, mediation, fact finding arbitration, or otherwise between the parties, in the public service or in private employment.

The law also includes a limited right to strike, when both parties agree to it. Following the mediation process, the

mediator-arbitrator gives both parties ten days notice of his intention to arbitrate. During this period, either party may withdraw its final offers. If both parties do so, a strike by the employees is legal.

The Wisconsin Association of School Boards has recently conducted a survey with respect to the history of the first year in Wisconsin under the med-arb law and, as might be expected, teachers' unions, particularly the NEA affiliate, were the chief users of the process. Over 70 percent of the med-arb petitions filed involved teachers; of those cases, the decisions ran three to two in favor of unions. Also, of course, a number of cases were settled prior to the actual issuance of an arbitrator's award.

So much for the Wisconsin law on this subject. I believe that it can be helpful to those of you from jurisdictions which haven't as yet gone as far as Wisconsin but face the possibility of doing so in the future.

There are some lessons to be learned from the Wisconsin experience, and I will conclude my remarks with comments regarding these lessons. The first is that municipal employers must create and maintain an effective lobbying organization at the state legislative level. For many years in Wisconsin, public employee representatives were unsuccessful in obtaining

legislation similar to that existing today. The policital climate wasn't right for it, and municipal employers simply had the votes necessary to defeat the unions' proposals without the need for negotiation and horse-trading. At one time, some years ago before the unions gained the power they have today, I had occasion to discuss some union-proposed legislation with a veteran lobbyist for Wisconsin's municipalities. I pointed out an aspect of the union proposal which, if it became law, would be extremely difficult for municipalities to live with, and suggested that, in the course of his lobbying activities, he at least try to have the bill amended so that, if it should pass, it would be more palatable to municipal employers. He gave me a very basic lecture on the folly of making bad legislation better. His theory was that if it remains obviously bad, it will be much easier to defeat. There is logic in this up to a point. In Wisconsin, I think our legislative liason people made a serious mistake by adhering to this "don't make bad legislation better" principle for too long. There had been an obvious message, both from the executive branch and from the legislators themselves, that some legislation was going to be enacted on the subject of municipal employment relations, and by simply opposing the

Union's proposals, we ended up with what they wanted in the first place.

Another lesson I think can be learned from Wisconsin's experience is that it was a mistake to hold so firm against allowing the right to strike that compulsory arbitration became the only alternative. It would have been far better to have simply granted municipal employees (except, possibly, policemen and firemen) the right to strike than to have forced compulsory arbitration on the many small, essentially rural, municipalities and school districts in which there would have been little or no chance of a union's mounting a successful strike. It was the union representatives who spoke for the teachers in the smaller districts who were the most active in pushing for compulsory arbitration. In verification of this, since the med-arb law went into effect, a high proportion of smaller districts have made use of the process. In addition, there remains the question--particularly in the case of large employers--of whether or not the med-arb law will prevent strikes in the case of the more militant bargaining unit. There is certainly credible evidence available from other jurisdictions that compulsory arbitration is not a guarantee against strikes.

The last, and possibly most important, lesson to be learned from our experience in Wisconsin, is to properly evaluate the importance to the unions of the compulsory union dues, or agency shop, requirement. It first got into the law when a conciliatory-type draftsman said (on the issue of preventing strikes): "To prevent strikes, let's legalize an agency shop, and then, if they strike, we can take it away from them." The legislature, and far too many municipalities, bought this argument lock, stock, and barrel, and the upshot was the recognition of the "fair share" concept.

Dues are the life blood of these unions, and allow them to carry on the effective lobbying campaign they have already mounted. By legalizing the concept, and then subjecting it to binding arbitration, we simply have made and continue to make it increasingly easier for them to obtain their goal.

The people who are in the mediation-arbitration business essentially believe in unionism; they are used to union militancy and are not offended by the concept of compulsory union dues. In the decisions handed down in Wisconsin, the unions have won the majority of the cases involving "fair share."

Where they have been defeated, it has been strictly on the question of comparables, and time will eventually take care of that. The unions will whittle away at a certain number a year, the comparables will begin to pile up, and total dues paying membership is not too far away. Further detail shouldn't be necessary to demonstrate the drastic problems created for employers, particularly public employers, where they cannot begin to match the union's legislative pocketbooks. And don't fool yourselves, these are essentially political battles. If we lose these, we ultimately lose at the bargaining table.